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## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALTER PEREZ ESCOBAR, MARGARITA  
GONZALEZ and FRANCISCO  
CISNEROS-ZAVALA, individually and on  
behalf of all others similarly situated,

No. C 08-01120 WHA

Plaintiffs,

v.  
WHITESIDE CONSTRUCTION  
CORPORATION, NMS SUPPLY INC.,  
J.W. CONSTRUCTION, INC., and  
DAVID R. WHITESIDE,

**ORDER GRANTING MOTION  
FOR LEAVE TO FILE A FIRST  
AMENDED COMPLAINT AND  
GRANTING MOTION FOR  
CERTIFICATION OF A  
COLLECTIVE ACTION**

Defendants.

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**INTRODUCTION**

In this putative class action, plaintiffs Walter Perez Escobar, Margarita Gonzalez, and Francisco Cisneros-Zavala sued defendants Whiteside Construction Corporation, NMS Supply Inc., J.W. Construction, Inc., and David R. Whiteside for unpaid wages. Plaintiffs now move to amend their complaint by adding an eighth claim pursuant to the Labor Code Private Attorneys General Act. They also move to certify a collective action. For the reasons stated below, plaintiffs' motion for leave to file a first amended complaint is **GRANTED**, and their motion for certification of a collective action is **GRANTED**.

**STATEMENT**

Plaintiffs worked as employees of defendant corporation Whiteside Construction Corporation, NMS Supply Inc., and/or J.W. Construction, Inc. David Whiteside is the

1 president of these companies. According to the complaint, defendants required plaintiffs to  
2 report to the Whiteside construction yard at 6:00 a.m. every workday. Whiteside management  
3 would then direct plaintiffs to where they were being assigned to work that particular day.  
4 Work schedules generally began at 7:00 a.m. and ended at 3:30 p.m.

5 Plaintiffs allege that they were not paid for any time spent before 7:00 a.m. or for the  
6 time spent traveling between the Whiteside construction yard and wherever plaintiffs would  
7 ultimately work that day. They further allege that they were rarely — if ever — compensated  
8 for the frequent occasions they spent working past 3:30 p.m. and for travel time from the  
9 construction site back to the Whiteside construction yard.

10 Nor did plaintiffs receive enough breaks. They were rarely provided with a ten-minute  
11 break within the first four hours of their workday. They were never provided with a ten-minute  
12 break during the second four hours of their workday. Oftentimes, plaintiffs had to either skip or  
13 prematurely end their lunch breaks. Although plaintiffs were required to drive their personal  
14 vehicles from the construction yard to the construction site, they were never paid a mileage  
15 stipend or compensation for gas money or bridge tolls.

16 Furthermore, plaintiffs contend that defendants failed to provide them with the  
17 information required by the California Labor Code. This included the legal name and address  
18 of the employer, the hours worked by the employee, and wages earned due to meal and rest  
19 penalties, and time and unpaid wages for pre- and post-shift work.

20 On February 25, 2008, plaintiffs filed suit against defendants, asserting the following  
21 claims: (i) defendants failed to provide one hour of pay for each work shift longer than four  
22 hours during which they were not provided a 10-minute rest period as required by the California  
23 Labor Code; (ii) defendants willfully failed to compensate plaintiffs in accordance with the  
24 California Labor Code; (iii) defendants failed to provide plaintiffs with the information required  
25 by the California Labor Code; (iv) defendants failed to provide overtime compensation under  
26 the California Labor Code; (v) defendants failed to provide minimum and overtime wages  
27 pursuant to the Fair Labor Standards Act; (vi) defendants engaged in unfair practices under the  
28 California Unfair Competition Law; and (vii) defendants failed to reimburse plaintiffs for costs

1 and depreciation of vehicles used to travel between the construction site and Whiteside  
2 construction yard.

3 The Court entered a case management scheduling order on June 19. It stated that leave  
4 to add any new parties or pleading amendments had to be sought by July 10. Plaintiffs did so;  
5 they filed a motion for leave to file a first amended complaint on July 10. A few days later,  
6 they also moved to certify a class.

## 7 ANALYSIS

### 8 1. LEAVE TO AMEND COMPLAINT.

9 Leave to amend a complaint “shall be freely given when justice so requires” under  
10 Rule 15(a). This standard is applied liberally. “In the absence of any apparent or declared  
11 reason — such as undue delay, bad faith, or dilatory motive on the part of the movant,  
12 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the  
13 opposing party by virtue of allowance of the amendment, etc. — the leave sought should, as the  
14 rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962).<sup>1</sup>

15 Rule 15(a) does not apply, however, when the party seeking leave to amend after the  
16 date specified in a Rule 16 scheduling order. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d  
17 604, 607–608 (9th Cir. 1992). Here, the more liberal standards of Rule 15(a) govern because  
18 plaintiffs sought leave to amend the complaint by the deadline set forth in the scheduling order.

19 Plaintiffs request that they be granted leave to add an eighth claim to the complaint  
20 pursuant to the Labor Code Private Attorneys General Act, California Labor Code § 2698 *et*  
21 *seq.* Plaintiffs wish to seek civil penalty recovery under this provision. In accordance with the  
22 procedures set forth in California Labor Code § 2699.3, plaintiffs sent written notice on June 20  
23 to the California Labor and Workforce Development Agency of the specific provisions of the  
24 code alleged to have been violated. The agency must notify the employer and aggrieved  
25 employee or representative by certified mail that it does not intend to investigate the alleged  
26 violation within 30 calendar days of the postmark date of the sent notice. If no notice were  
27 provided within 33 calendar days of the postmark date, the aggrieved employee could then

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28 <sup>1</sup> Unless indicated otherwise, internal citations are omitted from all quoted authorities in this order.

1 commence a civil action pursuant to Section 2699. Since the filing of this motion, plaintiffs  
2 have received written confirmation that the agency does not intend to investigate the alleged  
3 Labor Code violations (Harris Supp. Decl. ¶¶ 2–5). Plaintiffs also seek leave to add more  
4 specific allegations regarding defendants' alleged violations of various labor codes.<sup>2</sup>

5 Defendants argue that leave to amend is unwarranted here. A district court does not  
6 abuse its discretion in denying leave to amend where amendment would be "futile." *Flowers v.*  
7 *First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002). Defendants assert that the amendment  
8 would be futile. Section 2699.3(a)(1) provides that "[t]he aggrieved employee or representative  
9 shall given written notice by certified mail to the Labor and Workforce Development Agency  
10 and the employer of the specific provisions of this code alleged to have been violated."  
11 Although the written notice was provided to defense counsel, defendants say, it was not sent to  
12 "the employer." Citing California decisions, defendants argue that, because pre-lawsuit notice  
13 requirements in a statute are strictly interpreted, plaintiffs have failed to satisfy pre-filing  
14 requirements and their proposed amendment is therefore futile.

15 Defendants' argument is unpersuasive at this stage. "The standard for granting leave to  
16 amend is generous . . . '[L]eave to amend should be granted if it appears at all possible that the  
17 plaintiff can correct the defect.'" *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir.  
18 1990). Plaintiffs sent the notice to defense counsel after the start of the lawsuit and defendants  
19 were already represented by counsel. It is doubtful that plaintiffs are completely and  
20 permanently precluded from bringing a Private Attorneys General claim because they sent  
21 written notice to defendants' *attorney* rather than to their defendant employers themselves.  
22 Furthermore, California Rule of Professional Conduct 2-100(A) prohibits such behavior:  
23 "While representing a client, a member shall not communicate directly or indirectly about the  
24 subject of the representation with a party the member knows to be represented by another  
25 lawyer in the matter, unless the member has the consent of the other lawyer." Given the liberal  
26 standards of Rule 15, this order grants leave to amend the complaint.

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28 <sup>2</sup> The supplemental declaration was filed the evening before the hearing set for August 21, 2008.  
Nonetheless, the filing was allowed for good cause. The California Labor and Workforce Development Agency  
had faxed these letters to plaintiffs on August 20.

1           **2. COLLECTIVE ACTION.**

2           Plaintiffs request that this action be certified as an “opt-in” collective action with respect  
3 to the fifth Fair Labor Standards Act claim. They ask that the class consist of all persons who  
4 were employed by Whiteside Construction Corporation, NMS Supply, Inc., and/or J.W.  
5 Construction at any time from February 25, 2004, through August 21, 2008. Employers are  
6 liable under the FLSA if they fail to pay overtime wages.

7           Plaintiffs say that they and the putative class members were not paid the full minimum  
8 and overtime wages owing to them. According to 29 U.S.C. 207(a)(1), “[e]xcept as otherwise  
9 provided in this section, no employer shall employ any of his employees . . . for a workweek  
10 longer than forty hours unless such employee receives compensation for his employment in  
11 excess of the hours above specified at a rate not less than one and one-half times the regular rate  
12 at which he is employed.” Employees working less than forty hours a week should receive the  
13 minimum hourly wage for hours worked. 29 U.S.C. 206(a)(1)(A).

14           Employees filing suit under the FLSA can bring a collective action on behalf of  
15 themselves or “other employees similarly situated.” 29 U.S.C. 216(b). Neither the FLSA nor  
16 the Ninth Circuit has defined “similarly situated” yet. Most district courts in the Ninth Circuit  
17 apply a two-tiered approach. A court first decides, “based primarily on the pleadings and any  
18 affidavits submitted by the parties, whether the potential class should be given notice of the  
19 action.” *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 467 (N.D. Cal. 2004)  
20 (Walker, J.). This determination “is usually made under a fairly lenient standard and typically  
21 results in conditional class certification.” *Ibid.* The second stage occurs when discovery is  
22 complete and the case is ready to be tried. The party opposing class certification may then  
23 move for decertification. *Ibid.* Because the instant action is still in the first stage, this order  
24 will not address the factors needed to determine the propriety and scope of the class during the  
25 second stage. Certification is called “conditional” during the first stage because the opposing  
26 party could always (successfully) move for decertification.

27           The main issue is therefore whether plaintiffs’ allegations and evidence are sufficient to  
28 satisfy the “fairly lenient standard” required to send a conditional class notice under the FLSA.

1       “Courts have held that conditional certification requires only that ‘plaintiffs make substantial  
2       allegations that the putative class members were subject to a single illegal policy, plan or  
3       decision.’ Under this lenient standard, ‘the plaintiffs must show that there is some factual basis  
4       beyond the mere averments in their complaint for the class allegations.’” *Adams v. Inter-Con  
5       Sec. Systems, Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. 2007) (Patel, J.).

6           This order finds that plaintiffs have met this burden. The complaint alleged that  
7       defendants systematically deprived their employees of their earned minimum and overtime  
8       wages in violation of the FLSA. Plaintiffs provided sworn declarations saying that they were  
9       employed by defendants. They also stated that they were required to show up at 6:00 a.m.  
10      and assigned to 7:00 a.m.–3:30 p.m. work schedules but were not paid for the time spent  
11      working before 7:00 a.m. They were not compensated for the time spent driving from  
12      construction sites back to the Whiteside yard or for when they helped unload trucks there  
13      (Cisneros-Zavala Decl. ¶¶ 7–8; Escobar Decl. ¶¶ 7–8; Gonzalez Decl. ¶¶ 7–8).  
14      Conditional certification of this collective action is therefore warranted.

15           Defendants oppose certification of a collective action on various grounds. They first  
16      argue that the Portal to Portal Act, 29 U.S.C. 256, states that employers do not have to pay  
17      minimum wage for travel. An employer would not be liable under the FLSA for “(1) walking,  
18      riding, or traveling to and from the actual place of performance of the principal activity or  
19      activities which such employee is employed to perform, and (2) activities which are preliminary  
20      to or postliminary to said principal activity or activities, which occur either prior to the time on  
21      any particular workday at which such employee commences, or subsequent to the time on any  
22      particular workday at which he ceases, such principal activity or activities.” 29 U.S.C. 256(a).  
23      Travel is clearly not compensable, defendants say. This is not enough to deny certification,  
24      however. Aside from unpaid travel time, plaintiffs have also alleged and provided sworn  
25      declarations supporting their claim of not being paid for working before and after their work  
26      schedules.

27           Another problem defendants point to is that plaintiffs purportedly failed to demonstrate  
28      harm from a common company policy, plan, or decision. *See Adams*, 242 F.R.D. at 536.

1 Although plaintiffs say that defendants required them to report to the Whiteside yard by  
2 6:00 a.m. each workday, plaintiffs presented no further details. Instead, defendants proffered  
3 sworn declarations from plaintiffs' co-workers, one of the supervisors, and president/defendant  
4 David Whiteside saying that employees were not required to report to the yard before or after  
5 their shifts (Whiteside Decl. ¶¶7–10). In short, plaintiffs have sworn declarations saying that  
6 they were required to report to the yard. Defendants have sworn declarations saying otherwise.  
7 So it is a he-said-she-said situation. This order finds that plaintiffs have shown enough  
8 evidence to justify certification. It may be true that the evidence will later negate plaintiffs'  
9 claims, but this order will not deny conditional certification at this stage in the proceedings.

10 Defendants further argue that the FLSA claims require numerous individualized  
11 inquiries that render them inappropriate for conditional certification. These fact-specific  
12 inquiries include whether individual employees did in fact report to the yard before going to  
13 jobsites, whether they merely met at the yard to carpool with other employees, whether they  
14 performed any work while at the yard, and whether employees who went to the yard performed  
15 de minimis or compensable work. Not so. Here, the standard is "fairly lenient." All plaintiffs  
16 had to do was to make the substantial allegation that putative class members were victims to a  
17 single illegal policy, plan, or decision. That they did — they claim that they were required to  
18 arrive early to the construction yard and work more than their shifts required, without  
19 commensurate compensation.

20 Finally, defendants say that plaintiffs' proposed class is overbroad. Plaintiffs seek  
21 certification of all persons employed by Whiteside Construction Corporation, NMS Supply,  
22 Inc., and/or J.W. Construction at any time from February 25, 2004, through August 21, 2008.  
23 The class period will be limited to three years, however, due to the three-year statute of  
24 limitations. Defendants say that the class would then include overtime exempt employees,  
25 office and clerical employees, and field supervisors. Again, that is not the case. Plaintiffs  
26 request that a collective action be certified "for employees whose minimum and overtime wages  
27 were underpaid due to Defendants' routine practice of denying the payment of wages to  
28 employees who were forced to work before and/or beyond their scheduled hours" (Br. 2).

1 Office workers are excluded; the class is primarily limited to laborers and truck drivers.  
2 Plaintiffs estimate that there are about 292 potential class members (Harris Decl. ¶7, Exh. 5).  
3 They are also amenable to adding more limiting language to its proposed notice.

4 **3. NOTICE TO POTENTIAL CLASS MEMBERS.**

5 Plaintiffs also request that, following conditional certification, defendants should be  
6 ordered to disclose the identities and last-known addresses of employee class members.  
7 Plaintiffs should then be allowed to send out a court-approved form of notice to class members.  
8 They have attached a proposed form of notice that explains (i) the purpose of the notice,  
9 (ii) the nature of the litigation and counsel, (iii) how to participate in the lawsuit and the  
10 consequences thereof, (iv) what happens if recipients do not respond to the notice, and (v) how  
11 to obtain additional information (Harris Decl. Exh. 4).

12 In response to defendants' objections that the class is too large, plaintiffs suggested  
13 adding language in their proposed notice to make it clear that the collective action is only for  
14 employees who alleged underpayment of their minimum and overtime wages (Reply 1).  
15 Class members would not include office workers.

16 The Supreme Court has held that district courts have the discretion, in appropriate cases,  
17 to implement 29 U.S.C. 216(b) "by facilitating notice to potential plaintiffs." *Hoffmann-La*  
18 *Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989). This order finds that the plaintiffs have  
19 fulfilled the requirements of conditional certification. Notice can therefore be facilitated to  
20 potential plaintiffs in this action.

21 Plaintiffs also recommend that Gilardi & Co., LLC, be appointed the class action claims  
22 administrator. The Court finds that appointing Gilardi is an unnecessary expenditure at this  
23 point in the proceedings. Plaintiffs' counsel is responsible for sending notice to class members.

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## CONCLUSION

2 For the foregoing reasons, plaintiffs' motions for leave to amend and for certification  
3 of collective action are **GRANTED**. The class period has been changed to cover only three years  
4 — from August 21, 2005, through August 21, 2008. Defendants must provide plaintiffs with an  
5 electronic list of the California class members by **SEPTEMBER 4, 2008**. The amended complaint  
6 is due by **SEPTEMBER 11, 2008**. Notice should then be sent to class members by **SEPTEMBER**  
7 **18, 2008**. In order to timely opt in, class members must fill out and sign the opt-in form by  
8 **NOVEMBER 17, 2008**.

## IT IS SO ORDERED.

12 || Dated: August 21, 2008.

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**WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE**